

N.D.A.G. Letter to Engmann (June 30, 1986)

June 30, 1986

Mr. Scott Engmann
Executive Secretary
North Dakota Teachers' Fund for Retirement
1930 Burnt Boat Drive
P.O. Box 7100
Bismarck, ND 58502

Dear Mr. Engmann:

Thank you for your letter of May 23, 1986, in which you seek my advice concerning two questions. First, whether a school district "business manager" is a member of the Teachers' Fund for Retirement pursuant to N.D.C.C. §15-39.1-04(9)(a). If the answer to the first question is negative, you inquire whether "business managers" who are currently participating in the retirement plan may continue and, if not, what claim they have against the Fund.

N.D.C.C. §15-39.1-04(9)(a) defines "teacher" to include:

All persons who are certified to teach in this state who are contractually employed in teaching in any state institution or by any school board or other governing body of any school district of this state, including superintendents, assistant superintendents, business managers, principals, assistant principals, and special teachers employed in any state institution or in the school system of any school district in the state, except that the superintendent and assistant superintendent of the Grafton state school may be brought within this definition at their option. (Emphasis supplied.)

N.D.C.C. §15-39.1-04(9)(a) requires that the person be "certified to teach" before such person can be considered a "teacher" and a member of the Fund. Thus, a "business manager" must be "certified to teach" before he can participate in the Teachers' Fund for Retirement.

This interpretation is further supported by the provisions of N.D.C.C. §54-52-02.1 (North Dakota Public Employees Retirement System) which permits "permanent noncertified employees" of school districts to participate in the Public Employees Retirement System. If such "noncertified employees" were subject to the mandatory membership requirement of the Teachers' Retirement System, N.D.C.C. §15-39.1-09, the Legislature would not have authorized them to participate in PERS.

Your second question relates to "business managers" who are current members of the Fund even though they are not "certified to teach." You inquire whether they can continue their membership and, if not, what claim do they have against the Fund.

N.D.C.C. Ch. 15-39.1 does not provide discretion to the board to enlarge the class of membership in the Fund. Absent such authority, the board has no choice but to administer the Fund in accordance with statutory requirements and limit membership as provided. Thus, I am of the opinion that such "noncertified" employees cannot continue their membership in the Fund.

The North Dakota Supreme Court has defined the relationship between the teacher and the retirement fund as "contractual in nature" and subject to the "principles of law governing contracts." Payne v. Board of Trustees, 35 N.W.2d 553, 555 (N.D. 1948). Although the relationship between "noncertified" employees (who have contributed to the fund) and the Teachers' Fund is not authorized by law, the payment of money to the Fund created an enforceable quasi or constructive contract.

The theory of quasi contracts imposes an obligation on a party that received a benefit to make restitution when to retain such benefit would be unjust. Hendrickson v. Minnesota Power and Light Co., 104 N.W.2d 843, 846 (Minn. 1960); Northwestern Sheet and Iron Works v. Sioux County, 36 N.W.2d 605, 610 (N.D. 1949). As such, "noncertified" employees who have contributed to the Fund would be entitled to restitution.

The process of determining what amount must be refunded in making restitution to the "noncertified" employees who have contributed to the Fund necessarily involves a factual analysis of each individual case for which I cannot be of assistance.

As an alternative to terminating the "noncertified" employees' participation in the Fund, the board may propose the necessary legislation to enlarge the membership class of the Fund to include such employees. Additionally, the board may contemplate negotiating with NDPERS and the "noncertified" employees to arrange for a transfer of their accumulated moneys in the Teachers' Fund to PERS, which authorizes their participation. N.D.C.C. §54-52-02.1.

Please do not hesitate to contact me if further questions on this matter arise.

Sincerely,

Nicholas J. Spaeth

cv